

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH NORTH, SS.
NORTHERN DISTRICT

07-S-0254

State of New Hampshire

v.

Michael Addison

ORDER ON STATE'S MOTION REGARDING SCHEDULING OF NON-CAPITAL
TRIALS

The State moves to schedule the trials of the felony indictments pending against the defendant before his capital murder trial. The defendant objects. The Court held a hearing on the matter on April 5, 2007. Based on the parties' submissions and the applicable law, the State's motion is GRANTED.

On December 15, 2006, the Hillsborough County Grand Jury for the Northern District returned two indictments against the defendant, charging him with possession of a firearm (06-S-2572) and reckless conduct with a deadly weapon (06-S-2573). The indictments allege that on October 15, 2006, the defendant, a convicted felon, possessed a firearm and engaged in reckless conduct when he discharged that firearm at an apartment building in Manchester, New Hampshire. On December 19, 2006, the Hillsborough County Grand Jury for the Southern District returned two indictments against the defendant, charging him with armed robbery (06-S-2451) and conspiracy to commit robbery (06-S-2452). The indictments allege that on October 11, 2006, the defendant participated in the armed robbery of a convenience store in Hudson, New

Hampshire. On February 20, 2007, the Hillsborough County Grand Jury for the Northern District returned an indictment charging the defendant with capital murder, alleging that on October 16, 2006, he purposefully caused the death of Manchester Police Officer Michael Briggs.

The State now requests that the Court schedule the two felony indictments pending in this judicial district for trial before the capital murder trial.¹ The State argues that: (1) If the felony cases are not tried beforehand, highly probative evidence may be excluded during the penalty phase of the capital case; (2) the felony charges would not be adjudicated in a timely manner if they were scheduled after the capital murder case; (3) because the felonies occurred first and were indicted before the capital case, they should be tried first; and (4) because the capital murder trial is not scheduled until September 2008, the felony cases could be tried long before this date to diminish any potential prejudice resulting from publicity from the felony trials.

The defendant objects, arguing that the media publicity surrounding the felony trials will result in prejudice that may interfere with his right to a fair trial. He also claims that he will not be able to receive a fair trial on the felony charges if they are scheduled before the capital murder trial because of the publicity surrounding that case. Lastly, the defendant argues that scheduling the felony trial after the capital murder case would not prejudice the State, because it could still seek to admit evidence of non-adjudicated criminal acts at the penalty phase.

¹ The State has filed a similar motion in Hillsborough County Superior Court South to try the two cases pending there prior to the capital murder case.

The Court finds the State's arguments persuasive basically for two reasons: (1) the felony cases occurred first, were indicted before the capital case, and, in the ordinary course, would be scheduled first; and (2) evidence of any convictions the State may attain in the felony cases would probably be admissible aggravating factors for the jury to consider in the penalty phase of the capital murder trial.

Generally, "prosecutors have broad discretion in bringing charges against an accused." State v. Gooden, 133 N.H. 674, 680 (1990). After indicting a defendant, the State has a "constitutional duty to make a diligent, good faith effort to bring [him or her] to trial." State v. Hudson, 119 N.H. 963, 966 (1979). The State "ha[s] an interest, and a duty, to see that cases are heard in a speedy fashion." State v. LaPorte, 134 N.H. 73, 78 (1991). Victims of crime also have an interest in the speedy disposition of criminal proceedings, as they have "[t]he right to have inconveniences associated with participation in the criminal justice process minimized." RSA 21-M:8-k, II(g). However, matters of trial scheduling appear to be primarily at the judiciary's discretion. Cf. State v. Nelson, 103 N.H. 478, 484 (1961) ("[s]ince the Trial Judge is in the best position to weigh what would be fairest to both parties, he has wide discretion as to whether to grant a continuance [of trial]"); Super. Ct. R. 13 ("A party, plaintiff or defendant, subsequent to sixty days after entry of a suit, may by motion request that the Court place a suit on the trial calendar"); see also Commonwealth v. Taylor, 704 N.E.2d 170, 174 (Mass. 1999) ("However, the prosecutor's broad discretion over *whether* a case is prosecuted must be considered in conjunction with the

judiciary's wide discretion as to *when* a case goes to trial"). This discretion appears to be limited only by whether the scheduling decision is likely to violate a defendant's due process rights. See State v. Barham, 126 N.H. 631, 640 (1985).

Holding the felony trial at least two and a half years after the acts were allegedly committed would not advance the State's or the victims' interests in a speedy trial. Moreover, the felony crimes allegedly occurred on October 15, 2006, the day before the murder of Officer Briggs. The indictments on those felony charges were returned on December 15, 2006, two months before the defendant was indicted on the capital murder charge. The State has discretion in the manner in which it chooses to prosecute cases, likely including the order in which it chooses to try offenses. The Court is reluctant to interfere when, as here, the State logically seeks to try charges in the order of their occurrence and indictment.

Finally, the State has asserted its intent to submit evidence of any conviction it attains on the felony charges at the penalty stage to prove statutory or non-statutory aggravating factors. Whether any non-adjudicated criminal conduct would be admissible at the penalty stage is certainly open to dispute and fraught with potential proof problems. See e.g. United States v. Gilbert, 120 F. Supp.2d 147, 150-54 (D. Mass. 2000); United States v. Cooper, 91 F. Supp.2d 90, 108 (D.D.C. 2000); State v. Davis, 912 F. Supp.2d 938, 948-49 (E.D. La. 1996); State v. Clark, 24 P.3d 1006, 1030-31 (Wash. 2001); State v. McCormick, 397 N.E.2d 276, 278 (Ind. 1979). On the other hand, the relevance and admissibility of criminal convictions during the penalty phase are much less

subject to dispute. See e.g. Zant v. Stevens, 462 U.S. 862, 879, 888 (1983) ("Nothing in the United States Constitution prohibits a trial judge from instructing a [capital murder] jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination"); United States v. Grande, 353 F.Supp.2d 623, 631-32, 635-636 (E.D. Va. 2005); In the Matter of the Personal Restraint of Lord, 868 P.2d 835, 851- 53 (1994).

The defendant's objection is based on the concern that pre-trial publicity will prejudice both the felony trial and the capital murder trial if the felony trial is scheduled first. The Court finds that scheduling the felony trial first would not create undue prejudice to the defendant at either trial. The charges against the defendant have already garnered significant attention from the media, and his felony trial will likely generate more of the same. However, "it is the adverse nature of the publicity, not merely its quantity, that is critical." State v. Smart, 136 N.H. 639, 649 (1993).

At this point, the defendant has not demonstrated the kind of "inflammatory, adverse press" that would allow the Court to speculate that the future publicity surrounding the defendant's felony trial would taint the jury pool for the capital murder trial. See id. Moreover, the passage of time is likely to dissipate any prejudicial effect of this publicity before the capital murder trial commences. Considering that the capital murder trial is not scheduled until September 2008, the felony trial and its attendant publicity will likely subside long before the defendant's trial. See Smart, 136 N.H. at 649; Patton v. Yount, 467 U.S. 1025, 1032 (1984). Additionally, the defendant's alleged involvement in the


felony cases will receive publicity in any event, as his co-defendants' cases are resolved over the coming months. Finally, any prejudice resulting from pre-trial publicity will be addressed during the jury selection process. See Nelson, 103 N.H. at 484. For these same reasons, scheduling the felony charges for trial before the capital murder case will not jeopardize the defendant's right to a fair trial on those offenses.

For the above reasons, the State's motion is GRANTED.

SO ORDERED.

Date

4/9/07


Kathleen A. McGuire
Presiding Justice